



366702

"Winters, Karen"  
 <KWinters@ssd.com>  
 05/02/2006 11:21 AM

To Elise.Feldman@usdoj.gov, "Brooks, Patrick J."  
 <PBrooks@ssd.com>  
 cc Barbara.Rauch@deq.state.ok.us,  
 Jason.Barbeau@usdoj.gov, Betsey.Streuli@deq.state.ok.us,  
 bruce.kugler@epa.state.il.us, Deanna.Chang@usdoj.gov,  
 bcc

Subject RE: Lease Comments

Thanks for your comments. We are reviewing them now.

-----Original Message-----

From: Elise.Feldman@usdoj.gov [mailto:Elise.Feldman@usdoj.gov]  
 Sent: Tuesday, May 02, 2006 11:26 AM  
 To: Winters, Karen  
 Cc: Barbara.Rauch@deq.state.ok.us; Jason.Barbeau@usdoj.gov;  
 Betsey.Streuli@deq.state.ok.us; bruce.kugler@epa.state.il.us;  
 Deanna.Chang@usdoj.gov; christie.kincannon@ago.mo.gov;  
 cintron-silva.maria@epa.gov; costello.james@epa.gov;  
 ebessey@kdhe.state.ks.us; garypie.catherine@epa.gov;  
 JKMcManus@ag.state.oh.us; jmorgan@atg.state.il.us.; KCordry@NAAG.ORG;  
 kloeckner.jane@epa.gov; piercejc@michigan.gov; Jeffrey.Sands@usdoj.gov;  
 sykes.terry@epamail.epa.gov; Alan.Tenenbaum@usdoj.gov  
 Subject: RE: Lease Comments

Karen,

Here are some preliminary comments on the custodial trust agreement. There may be more comments coming from the states or EPA, (I have not heard from any of the states on this yet) but I wanted to try to comply with your request last night for our comments by 11:00 today.

1. The Trust needs to comply with all requirements of applicable law. It may not limit its compliance to laws that it deems "necessary". There is no authority to absolve the owner of property of compliance with laws governing that property under the guise of a determination of whether such legal requirements are deemed to be "necessary." Congress makes the laws and agencies establish rules to implement them. Unless laws are unconstitutional or rules are arbitrary and capricious or contrary to statute, they must be complied with and cannot be reexamined as to whether they are "necessary". Therefore, the words "necessary" and "reasonably necessary" needs to be deleted from the definition of "Environmental Actions." Likewise for references to "necessary" in Section 2.3.

2. Section 2.1(b). Add to last sentence: "provided, however, nothing herein shall release, nullify, or preclude any liability of any entity to a governmental unit under police and regulatory laws to the extent that such entity would be subject to liability as an operator of property after the Effective Date of the Plan." In addition, the entities listed in the parenthetical could have liability that is independent of NewCo based on liability arising before NewCo was created or arising from acts of NewCo or other entities after the Effective Date. Needs to be fixed.

3. Section 2.3. No role is provided for the Government to select response action or review investigations or cleanup actions. This is unacceptable and contrary to law.
4. Sections 2.5 and 6.1. The Government should have full rights for accountings and reports.
5. Section 2.8. What are the "claims" that constitute Custodial Trust Assets?
6. Section 3.2. This paragraph appears to be structured inconsistently with the role of courts, especially post-confirmation. Even if this degree of post-confirmation involvement of the Court is appropriate, the Trustee should propose a budget to the Government; if the Government objects, the Court can hold a hearing. This paragraph needs to provide that any budget will conform to the applicable legal requirements governing cleanup of the property.
7. Sections 3.4 and 3.5. No funds can be released until all Environmental Actions have been certified by the Government to be completed.
8. What does the last sentence of Section 3.5 mean? How can rentals not be credited as Lease Funding? If cleanup has not been completed, substitute funding must be provided.
9. Section 4.2. Last sentence. Advice of counsel should not be able to modify requirements of the agreement.
10. Section 4.10. The Trusts have no funds for indemnification except possibly from the administrative account. The administrative account would need to be funded for this.
11. Article V. The Governments should be Beneficiaries of the Trust cleanups.

-----Original Message-----

From: KWinters@ssd.com [mailto:KWinters@ssd.com]  
Sent: Monday, May 01, 2006 9:03 PM  
To: Feldman, Elise (ENRD); PBrooks@ssd.com; SKane@ssd.com; SLerner@ssd.com  
Cc: Sands, Jeffrey (ENRD); Barbeau, Jason (ENRD); Chang, Deanna (ENRD); Tenenbaum, Alan (ENRD); cintron-silva.maria@epa.gov; costello.james@epa.gov; garypie.catherine@epa.gov; jmorgan@atg.state.il.us; kloeckner.jane@epa.gov; sykes.terry@epamail.epa.gov; piercejc@michigan.gov; bruce.kugler@epa.state.il.us; Barbara.Rauch@deq.state.ok.us; Betsey.Streuli@deq.state.ok.us; KCordry@NAAG.ORG; christie.kincannon@ago.mo.gov; ebessey@kdhe.state.ks.us; JKMcManus@ag.state.ch.us  
Subject: RE: Lease Comments

Elise-thanks very much for your comments regarding the draft Lease. We will make revisions as appropriate. You mentioned in our call earlier today that you would be forwarding comments regarding the draft Custodial Trust Agreement, although we have not received them as yet. I understand there may be others commenting as well. We would appreciate you forwarding any comments you may have by 11am tomorrow. We will further defer filing of the Plan Supplement until 2pm tomorrow to allow

for consideration of comments received. Thanks.

-----Original Message-----

From: Elise.Feldman@usdoj.gov [mailto:Elise.Feldman@usdoj.gov]  
Sent: Monday, May 01, 2006 1:37 PM  
To: Brocks, Patrick J.; Winters, Karen  
Cc: Jason.Barbeau@usdoj.gov; Deanna.Chang@usdoj.gov;  
cantron-silva.maria@epa.gov; costello.james@epa.gov;  
garypie.catherine@epa.gov; jmorgan@atg.state.il.us.;  
kloeckner.jane@epa.gov; Jeffrey.Sands@usdoj.gov;  
sykes.terry@epamail.epa.gov; Alan.Tenenbaum@usdoj.gov;  
piercejc@michigan.gov; bruce.kugler@epa.state.il.us;  
Barbara.Rauch@deq.state.ok.us; Betsey.Streuli@deq.state.ok.us;  
KCordry@NAAG.ORG; christie.kincannon@ago.mo.gov;  
ebessey@kdhe.state.ks.us; JKMcManus@ag.state.oh.us  
Subject: Lease Comments

Patrick,

Below are a number of comments from this office on the draft Lease. I have not heard from any of the States or from EPA and their comments may still be coming, but I wanted to get you our thoughts as quickly as possible.

1. Add as Miscellaneous provision: "Nothing herein shall release, nullify, or preclude any liability of Tenant to a governmental unit under police and regulatory laws to the extent that Tenant would be subject to liability as an operator of the Premises after the Commencement Date."
2. The Lease can be terminated before cleanup (including O&M) is complete, so the Plan needs to provide an alternative for funding after termination.
3. Section 3.5(a). The Oil Pollution Act should be added.
4. Sections 3.6 and 3.7, The Trust is given a right of access only with respect to Tenant's breaches and investigations thereof and to install monitoring equipment. The Trust (Landlord) needs a general right of access, which should include a right to access at all times to the Premises for the following purposes and activities:
  - a. Conducting investigations relating to Hazardous Substances at or near the Premises;
  - b. Obtaining samples;
  - c. Assessing the need for, planning, or implementing Remedial Action at or near the Premises;
5. Section 3.7. Further information is needed about the potential for repairs to property as a result of the remedial action and proof that such potential repairs are part of the Trust's budget. In the absence of such information, the last sentence of this section should be deleted.
6. Section 3.8, first sentence, add to end: or where 10 days notice is not feasible, reasonable advance notice to the extent practicable based on the need for Remedial Action and site conditions.

7. Section 11.11. The Trust will not have funding to pay the Lessee's attorney's fees. Therefore, it cannot agree to pay the Lessee's attorney's fees. Since the Trust will also not have funding for its own attorney's fees, this section should be rewritten to apply only to require payment of the Trust's fees in the event that it is the Prevailing Party.

Thank you. Look forward to speaking with you soon. Elise.